United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74 1168

In the

UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 74-1348

WARNER BROS., INC. and COLUMBIA PICTURES INDUSTRIES, INC.,

Petitioners,

-against-

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA

Respondents.

REPLY BRIEF OF PETITIONERS WARNER BROS., INC. AND COLUMBIA PICTURES INDUSTRIES, INC. AND INTERVENORS NATIONAL COMMITTEE OF INDEPENDENT TELEVISION PRODUCERS AND SAMUEL GOLDWYN PRODUCTIONS

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
(212) 935-8000

Theodore C. Sorensen
Stuart Robinowitz
George P. Felleman
Donald E. Brown

Of Counsel

FLY, SHUEBRUK, BLUM & GAGUINE
45 Rockefeller Plaza
New York, New York
(212) 247-3040

Jerome S. Boros

Of Counsel

Attorneys for Petitioners and Intervenors

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

REPLY BRIEF OF PETITIONERS WARNER BROS., INC. AND COLUMBIA PICTURES INDUSTRIES, INC. AND INTERVENORS NATIONAL COMMITTEE OF INDEPENDENT TELEVISION PRODUCERS AND SAMUEL GOLDWYN PRODUCTIONS

This brief is submitted by petitioners Warner Bros., Inc. (Warner) and Columbia Pictures Industries, Inc. (Columbia) and intervenors National Committee of Independent Television Producers (NCITP) and Samuel Goldwyn Productions (Goldwyn) in reply to the separate answering briefs of the FCC and the Department of Justice and also in reply to the briefs filed herein by intervenors ABC and National Association of Independent Television Producers and Directors (NAITPD).*

At the outset, we wish to correct the impression sought to be created by NAITPD in its brief (p. 12) and ABC (ABC Br., App. A) that the "major" motion picture companies are the principal opponents of the prime time access rule (PTAR), whereas most small "independent" producers favor the rule. That is not true. For example, intervenor NCITP, which urges repeal of the rule, is composed of 75 individual production companies covering a broad range of diverse creators of television programs. Most are small independent creative entities who lack their own studio or distribution facilities. In contrast, some of NAITPD's 13

---

* Permission to file this reply was granted at the oral argument on April 5, 1974. Two of the above answering briefs were not received until the very eve of the argument of this expedited appeal.

members are large public companies;* spin-offs of the networks' major syndication divisions;** or major suppliers to the networks -- including Goodson-Todman which today alone supplies 25 weekly daytime half hours of programs to the networks, probably more regular programming than any other producer in the entire industry.***

Nor is it correct to suggest that motion picture companies boycotted access production.**** Indeed, as shown at the oral hearings before the FCC (Tr. 162-68), Twentieth Century Fox

---

* Metromedia, Viacom and Filmways.

** Viacom (CBS) and Worldvision (ABC).

*** Goodson-Todman now supplies five weekly game shows to the networks, each of which is televised five times a week. ("The Price Is Right," "Password," "Match Game '74," "Tattletales" and "Now You See It.") NAITPD member Filmways had produced series such as "Beverly Hillbillies," "Petticoat Junction," "Green Acres" and "Bearcats" for network prime time television. And NAITPD member Metromedia, a large station owner and producer, currently produces "The Firehouse" series and some Movies of the Week for the ABC prime-time television network.

**** For example, 20th Century Fox had four access shows on the air last year (Transcript of Oral Argument Before the FCC in Consideration of the Operation of, and Possible Changes in, The "Prime Time Access Rule," July 30-31, 1973, hereinafter cited as "Tr.", 162-8) and three this season (Variety, April 3, 1974, p. 35). MGM, as noted infra, produced "Dr. Kildare" for access and attempted production of another show (Tr. 190-2). Columbia had one access show on the air and both petitioners Columbia and Warner had developed other access programs but did not receive network O & O commitments. Allied Artist has an access show on the air (Variety, April 3, 1974, p. 35).

was among the most active distributors of access programs, with four different shows. It had as many series in access periods as in prime time periods last year. But it found that the economics of the access syndication market required that its programs be produced abroad at substantially less expense and with significantly lower production elements and quality than its network programs; and, moreover, that it could only proceed with access shows if it first had a commitment from the network O & O stations.

Similarly, as shown at the FCC hearings (Tr. 190-92), MGM inexpensively recreated its popular former network series "Dr. Kildare" for access time. But, because of the limited economic base of the access syndication market, MGM had to use revised old and discarded scripts from the network series, actors of lesser renown, and production elements not comparable to the original series or the programs MGM produces today for network distribution. Ironically, some of the rule's proponents singled out "Dr. Kildare" as one of the outstanding access shows. Yet it was discontinued "[b]ecause stations prefer the many less expensive shows the rule has fostered" (Tr. 191). The Commission's Report and Order notes that this was one of the few domestic dramatic shows in access time periods. (¶ 92, JA 120-21)*

---

* "JA" refers to the Joint Appendix of NAITPD and Westinghouse Broadcasting Co., Inc. in Cases 74-1168 and 74-1283. All paragraph references herein, unless otherwise indicated, are to the Report and Order released February 6, 1974, FCC 74-80 (Docket 19622). "A" refers to our Appendix filed with our principal brief in this action.

The fact is that, as found by the Commission's Economist (A 172), the vast majority of independent producers -- large and small -- seek repeal of PTAR. They desire a return to a free marketplace which will support their best creative efforts.

NCITP's 75 members are every bit as "independent" as NAITPD's 13 members. So are petitioners Warner and Columbia, who have joined with others in an antitrust action against two of the networks.* Surely, they are no less "independent" than Goodson-Todman who supplies 25 half hours of game programs for the networks plus many hours for their O & O stations. Surely, they are no less "independent" than the two NAITPD members (Viacom and Worldvision) which are recent spin-offs of the networks' syndication arms. The Constitution and public interest do not permit different treatment for different groups of "independent" producers.

I

PTAR's INABILITY TO ACHIEVE DIVERSITY IS NO LONGER IN DISPUTE

PTAR was passed to encourage a great diversity of programs and sources** in the hope that the public would thereby

---

* Columbia Pictures, et al. v. ABC, CBS et al., 70 Civ. 4202 (E.L.P.), U.S.D.C., S.D.N.Y.

** 23 FCC 2d 382, 389, 394-95, 400; 25 FCC 2d 318, 326, 37 FCC 2d 900, 909; Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 477 (2d Cir. 1971).

receive the widest choice of ideas and entertainment. The rule has failed to achieve those objectives.

Thus, the FCC now frankly concedes (pp. 14, 17, 18-19, 24-25) that PTAR has in fact eroded the diversity of program choices for viewers over the past three years. It states, for example, that viewers are now faced with "the present reality of a deteriorating diversity in programming" (p. 18); and that "the disappointing fact is that this has not resulted in diversity of program choices to the public" (p. 25).

Nor has PTAR increased diversity of program sources, as shown by the Report and Order (¶ 95, JA 121). The FCC's Economist, Dr. Alan Pearce, after interviewing more than 170 industry executives (A 305-14), stated: "I don't know of a single company that has gone into business as a result of the rule" (SA 3).* The main effect of PTAR on program sources has been to increase the concentration of production for access hours into fewer hands, with three producers commanding an unprecedented 50% of all syndicated access time.**

In view of the foregoing, PTAR should now be invalidated under Mt. Mansfield's rationale because three years of

---

* "SA" refers to the Supplemental Appendix filed with our Intervenors' Brief in Cases 74-1168 and 74-1283. Dr. Pearce also found: "Many of the independent production companies selling programs for the prime-time access periods were in daytime and prime-time production long before the prime-time access rule was passed" (A 171).

** Our principal brief, p. 25.

experience show that it has frustrated the paramount First Amendment right of the public to the greatest "diversity of programs and development of diverse and antagonist sources". (442 F.2d at 477) As a result, it can no longer justify interference with free speech rights of viewers, producers and broadcasters. (442 F.2d at 476-79) That is particularly true in light of the opinion in Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973), decided after Mt. Mansfield, which placed more emphasis on the free speech rights of broadcasters. (See, e.g., 412 U.S. at pp. 105, 109-10, 116, 120)

Nevertheless, the FCC argues (p. 19) that it has "discretion" to continue PTAR "allowing for the possibility that high-cost diversified programming on a scale sufficient to justify the restraint imposed by the access rule might materialize" (emphasis added).* But the public's First Amendment rights cannot be sacrificed any longer to such "speculative" claims. Columbia Broadcasting System v. Democratic National Committee, supra, at p. 127.

The notion that three years is not a sufficient test period because things possibly might change ignores the economic

---

* In contrast to this vague speculation, three years ago the Commission made firm predictions that there would be an increase in diversity. 25 FCC 2d 318, ¶ 17; 23 FCC 2d 382, ¶ 36.

factors that led to an erosion of diversity, and will of necessity continue to do so.

Stations which can license inexpensive access fare -- particularly replicated old network game shows (costing no more than $5,000 to $10,000 to produce) for $300 or less per episode -- obviously have no economic incentive to change this lucrative pattern.* Westinghouse, the creator of NAITPD, Metromedia and other producers found on the basis of experience that diversified non-game access shows, which cost more to produce, were rejected by local stations in favor of game shows which could be licensed for much less. Westinghouse and NAITPD's founder thus totally abandoned production of access shows.** If Westinghouse could not succeed, who can?

The Commission's vague hopes to the contrary notwithstanding, the steady acceleration of game shows -- from 11% to 23% to 49% to 55% in annual leaps since 1970 -- is continuing.

---

* One television commentator recently noted: "[L]ocal stations certainly aren't going to give up their extremely lucrative Let's Make A Deals without a fight." TV TIMES, December 23, 1973. In a similar vein, The Wall Street Journal, November 24, 1972 (pp. 1, 11) observed that "the game shows can't be beaten" and quoted two of the nation's largest multiple-station owners who are making large profits from game shows (A 74-75). One of these group-station owners stated that such access programs "aren't the artistic equivalent of the Pieta," but "economically we are doint quite well." Id. at p. 11.

** See our principal brief, pp. 18, 31-2, in this appeal and our intervenors' brief in the companion appeals (hereinafter called "our intervenors' brief"), pp. 7-8, 14-15.

This week's trade papers report that CBS and NBC O & O stations plan more game shows next year from Goodson-Todman, Sandy Frank and others -- in some cases, sixth or seventh episodes of shows already appearing five times a week on network daytime television.* The plain reason is economics. Thus, at the FCC's hearings, Goodson-Todman's Executive Vice President had the following colloquy with Commissioner (now Chairman)Wiley (Tr. 90):

> "MR. WILEY: Would you acknowledge another reason why game shows proliferate to some degree in the access hour, is it simply economics?
>
> "MR. CHESTER: Certainly."

The economic forces of the marketplace will necessarily continue this lack of diversity during access periods. The FCC should not be allowed to perpetuate a rule which clearly produced this deterioration of diversity on the basis of a mere <u>possibility</u> that things <u>might</u> improve. Three years' experience and the economics of access syndication prove that this is empty speculation.

---

* <u>Variety</u>, April 3, 1974, p. 35.

II

PTAR'S FAILURE TO DIMINISH NETWORK DOMINANCE MUST BE CONFRONTED

The FCC (p. 18) dismisses as "mere speculation" the demonstration in our principal brief (pp. 33-40) that PTAR increased network dominance contrary to one of its primary goals. But the Commission's Economist did not view this as "speculation" in his 167-page Report based on an in-depth study of the television industry for more than a year in conjunction with this proceeding, including interviews with more than 170 executives throughout the industry. He found that PTAR increased network dominance:

> "Overall network power has been strengthened, not weakened, by the prime-time access rule. Network originated programming has become scarce, resulting in greater advertiser demand for commercial minutes. . . . It has, in addition, strengthened the network's bargaining position with program producers, who are now required to compete for fewer prime-time network hours. (A 167-68)
>
> * * *
>
> "The five owned and operated stations that belong to each of the three networks are in a potentially better financial position as a result of the prime-time access rule . . . Moreover, it is important to note that a program stands little chance of being successful in syndication unless the networks' five owned and operated stations buy it. The networks and their owned and operated stations, therefore, have a great deal of financial power over those programmers producing for the prime-time access

periods, and thus over the total choice of programming available for access time on other stations. (A 169-70)

* * *

"Network control over the program production industry was strengthened, not weakened, by the prime-time access rule in a very important respect. The network's bargaining position with Hollywood program production houses was strengthened because the market for expensive television programming had been reduced by roughly 16 percent without any commensurate reduction in the number of production houses. . . . (A 204)

* * *

"Apparently advertisers have more money to spend than the networks have time to sell, causing the price to go up. This scarcity of advertising time was a direct result of the prime-time access rule. (A 207)

* * *

"In summary, the networks have not been hurt financially at all by the prime-time access rule, nor has their power diminished. An almost immediate result of the rule was the improvement of bottom line profit figures. (A 211)

* * *

"As a result, the networks would probably show no great disappointment if the rule were retained; they lost some marginal programming, and gained in revenues and profits." (A 211)

The validity of those conclusions is confirmed by the networks' behavior in these proceedings. In 1970, all three networks vigorously opposed the original adoption of PTAR.

Now, after seeing it in operation, all three support the rule.* The very targets of the so-called anti-network rule have become its supporters. Why? At the FCC's hearings, ABC's counsel gave the reason (Tr. 366):

> "THE CHAIRMAN: You said that quite clearly. I don't disagree, but why is it a good regulation? Because it happens to help you?
>
> "MR. McKENNA: That is exactly it."**

Nor did the FCC, in contrast to its present brief, always view the matter of PTAR's enhancement of network dominance as "mere speculation." When it decided to continue the rule in its November 29, 1973 Public Notice (JA 47), simultaneous reports in The Wall Street Journal and the trade press stated that the FCC at the same time had decided to launch a separate rule-making proceedings directed at the problem of network dominance.***

---

* ABC supported PTAR in the current rule-making proceedings. NBC dropped its opposition at the FCC's hearings, stating "we are not as offended by the rule as we used to be" (Tr. 376-77). CBS, originally philosophically opposed to the rule as an example of government interference in broadcasting, has now become a supporter of the rule. See CBS Brief in the companion appeal (74-1168), April 1, 1974.

** ABC's five O&O stations last season devoted more than 50% of syndicated access time to game shows (A 55, 123-27), including "Let's Make A Deal" (being simultaneously stripped on the ABC daytime television network) and "Parent Game" (a spin-off of two comparable game shows being simultaneously stripped on the ABC daytime television network). (A 8, 123-27)

*** The Wall Street Journal, December 3, 1973, p. 2; Broadcasting, Dec. 3, 1973; Dec. 10, 1973, pp. 5, 33; Variety, Dec. 5, 1973; Dec. 12, 1973, p. 35; and Television Digest, Dec. 3, 1973.

The networks struck back with a public relations campaign,* and the FCC reportedly abandoned its planned investigation as a result of this pressure and also the departure of certain of its members.**

In addition to abandoning that investigation, the FCC in this proceeding also refused even to consider solutions to the long-standing problem of network dominance even though Westinghouse urged this approach in this proceeding*** and even though specific alternatives were proposed by former Chairman Burch (SA 24-29), former Commissioner Johnson (SA 16-23), the Commission's Economist (A 176-180), the Office of Telecommunications Policy,**** and others. See, e.g., Economic Aspects of Television Regulations, Noll, Peck and McGowan, The Brookings Institute (1973); New Television Networks, R. E. Park, The Rand Corporation (1973); Technical Analysis of VHF Television Broadcasting Frequency Assignment Criteria, Office of Telecommunications

---

* The New York Times, Dec. 6, 1973, p. 95; The Wall Street Journal, December 6, 1973; Broadcasting, Dec. 10, 1973, p. 7; Variety, Dec. 12, 1973, p. 35.

** The Wall Street Journal, December 21, 1973; Daily Variety, Dec. 2[illegible], 1973, p. 1; The Hollywood Reporter, Dec. 24, 1973, p. 1.

*** See our intervenor's brief, pp. 30-1.

**** See our principal brief, p. 9.

Policy (1973). These alternatives, among other things, proposed the creation of additional networks and affirmative action to encourage the development of new competing media, such as cable television and subscription cable. Those alternative solutions, unlike PTAR, seek to deal with some of the root causes of the structural problem of a network triopoly. But the FCC continued a rule that increased network dominance while refusing to explore alternative solutions.

As noted in our principal brief (pp. 67-68), this Court in Scenic Hudson Preservation Conf. v. Federal Power Com'n, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966), reversed the action of another administrative agency because it had failed to consider alternative solutions to the problem before it, ignored its own staff's recommendations, and substituted contrary unsubstantiated views.* Here the FCC not only failed to consider alternative solutions but also totally ignored its Economist's 167-page Report, and dealt with the entire problem of network dominance in a single conclusory paragraph (¶ 92), without making a single factual finding on the matter and without explaining why its Economist's findings were incorrect.

The FCC's answering brief is silent about these inexplicable lapses. Yet, the problem of network dominance

---

* Also see Davis, Administrative Law (1959), p. 201.

has preoccupied the FCC for two decades in a myriad of proceedings. When all else failed, the FCC passed PTAR as a possible solution. Its Report and Orders in 1970 adopting PTAR (23 FCC 2d 382, 25 FCC 2d 318) were replete with discussions of the problem of network dominance in the minutest detail. It is thus incredible that the more than 100-page present Report and Order does not contain a single factual finding on this crucial subject, deals with it in a single conclusory paragraph, and refuses to discuss the Economist's Report or alternative solutions.

This is not only arbitrary and capricious in the extreme, but also violates the FCC's statutory duty to promote competitive conditions in the broadcasting industry. The Justice Department's brief, while stressing its own paramount right to enforce the antitrust laws, recognizes that the FCC is "the first line of defense against anticompetitive injury to the public interest in broadcasting" (p. 5) and "has, as part of its public interest responsibilities under the Communications Act, an obligation to take the nation's competitive policy into account (see e.g., Federal Communications Commission v. RCA Communications, Inc., 346 U.S. 86, 94; National Broadcasting Co. v. United States, 319 U.S. 190, 218; Mt. Mansfield Television,

Inc. v. FCC, supra)". (p. 2)* The FCC has violated that duty here.

---

* Inasmuch as the Department of Justice did not participate in the current rule-making proceeding, its six-page brief does not attempt to answer the First Amendment or other points raised in our principal brief. Instead, the Department stresses its independent power to enforce the antitrust laws, apparently because the networks had moved to dismiss the government's antitrust actions on the claim that the FCC had primary jurisdiction. That claim has been rejected. U.S. v. NBC, 1974 CCH Trade Reg. Rpt., ¶ 74,885 at p. 95,987 (C.D. Cal. October 29, 1973).

III

THE UNCONSTITUTIONALITY OF THE MOTION PICTURE AND OFF-NETWORK BANS CANNOT BE IGNORED

The FCC's brief makes no attempt to answer the demonstration in our principal brief (pp. 46-49) that the so-called "off-network" ban is arbitrary and unconstitutional, particularly in light of the fact that most access programs are themselves "off-network" in reality because they are merely replications of old network shows or sixth or seventh episodes of current network shows stripped five times a week during network daytime television.

The FCC's brief also does not question the fact, demonstrated in our principal brief (pp. 40-41), that the present movie ban (when coupled with the basic rule itself and station news practices)will in practical effect create a blackout of all locally scheduled movies on affiliated stations from 5 to 11:30 P.M. Thus, a viewer who missed a popular motion picture on network television will now have little opportunity to see it on his local station. This total ban on an entire category of protected free speech -- merely because it happens to be in the form of a motion picture -- is an unprecedented violation of the First Amendment.

There is no basis for the FCC's claim (pp. 27-28) that Mt. Mansfield upheld the present flat ban on motion pictures.

The Court there upheld the original provision of PTAR which specifically allowed access use of any and all feature films unless they had been televised in a market within the prior two years. The new rule, in contrast, totally bans all feature films.*

Finally, the FCC's brief, while relying heavily on claims as to the desirability of the so-called "permissive" exceptions to PTAR allowing stations to present children's specials, documentaries or public affairs programs for one-half hour a week, does not respond to the demonstration in our principal brief (pp. 57-61) that it is unconstitutional to permit the use of such preferred categories, while at the same time banning feature films that deal with similar or identical thematic material.

---

* Moreover, assuming arguendo that Mt. Mansfield had approved the total ban on all movies, the factual premise for the rule would no longer be applicable in any event. The Court three years ago allowed a limited movie restriction only as an adjunct to a rule that the FCC predicted would lead to greater diversity. But the FCC now concedes (p. 18) "the present reality of a deteriorating diversity." Yet, the Commission now replaces the prior limited two-year restriction with a total ban.

IV

THE PERMISSIVE PROGRAM CATEGORIES CANNOT MAKE PTAR CONSTITUTIONAL

Avoiding all of the foregoing issues, the FCC's brief relies primarily on the oft-repeated claim (pp. 5, 8, 10-15, 22, 26, 33) that public benefits will flow from the so-called "permissive" exception to the rule allowing one-half hour of access time per week for children's specials, documentaries and public affairs shows. Of course, if the Commission wishes to encourage such programming, it does not need PTAR to do so. Indeed, the FCC's Report and Order (¶¶ 83-84, 101, JA 114-15, 124) and brief (pp. 23, 25) concede that PTAR has in fact discouraged such programs.

If the Commission wishes to stimulate material that will serve the interest of viewers, it can do so, within the statutory framework established by Congress 40 years ago, in its determinations to grant or renew licenses. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 379-86 (1969); Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 109-14 (1973). Alternatively, it can promulgate Constitutional rules or issue policy statements that encourage programs in the public interest. But any action taken must not trample on First Amendment rights. PTAR does trample on these rights: it causes a "deteriorating diversity in programming" (FCC Br., p. 18); it

bans discrete episodes of popular so-called off-network programs (while permitting replications or continuations of network game shows); it totally bans feature films; and it removes, even when they are independently produced, expensive and high quality programs from the process of network distribution. Permissive categories cannot save a rule which has mandatory bans.*

The only cases cited by the Commission (p. 27) as Constitutional justification for the rule's distinctions -- between permissive and prohibited programs -- are Gross v. FCC, 480 F.2d 1288 (2nd Cir. 1973) and Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278 (2nd Cir. 1965). But those cases are totally inapposite. They both dealt with non-broadcast frequencies allocated to special limited uses (citizens' radio services and amateur radio stations). In those cases, this Court merely upheld rules reinforcing the restricted uses for which those scarce frequencies had been set aside (e.g., preventing frequencies allocated for special business purposes to be used as a hobby or diversion). Those cases clearly do not support the Constitutionality of PTAR -- a rule which violates the viewers' paramount First Amendment right to the greatest "'diversity of programs and development of diverse and antagonistic sources'" (Mt. Mansfield, 442 F.2d at 477). The new

---

* Moreover, the so-called "permissive" label is misleading. A station may accept a network program for one access half-hour only on the condition that it fits into one of the preferred categories. It may not accept other types of programs. That is not a permissive rule. That is censorship.

exceptions to the rule, indeed, merely create additional Constitutional problems.*

---

* See our principal brief, pp. 58-63. There is no basis for the FCC's claim that its adoption of preferred program categories will avoid the need to pass on more waiver requests, such as the arbitrary and unconstitutional Wild Kingdom-Lassie distinction (our principal brief, pp. 48-49). Because of the vague language used, the modifications will necessarily invite a flood of interpretations and waiver requests that involve more impermissible program evaluations (Br., pp. 8, 12). For example, how broad is the undefined and undefinable exception for "children's specials"? What are the boundaries for the undefined and undefinable category of "public affairs programming"? How will the Commission enforce its definition of documentaries as "any program which is non-fictional and educational or informational"? And how will the Commission deal with waivers for "an international sports event such as the summer or winter Olympic games, New Year's day college football games, or any other network programming of 'special' nature other than sports or movies" which occupy all or most of network prime time? Indeed the Report and Order itself states (¶ 110 JA 128) that the "chief problem in this connection is what should be considered 'special' programming" and adds that "it appears undesirable to attempt to define exactly all of the kinds of material."

V

THE UNSUPPORTED AND CONTRADICTORY CONCLUSIONS OF THE FCC VIOLATE THE POLICIES OF BOTH THE ADMINISTRATIVE PROCEDURE ACT AND THE CONSTITUTION

The FCC states (p. 15): "Despite a thorough Report and Order, (JA 51-167), of more than 100 pages, Petitioners insist that the Commission did not adequately explain its decision." But the Report and Order contains only 8 pages of findings of fact (JA 142-49) and 23 pages of conclusions (JA 110-133) -- mostly unrelated to or unsupported by the findings. The balance of the Report and Order, more than 80 pages, consists of a voluminous summary of the arguments advanced by the parties and background facts. We know of no other federal administrative opinion involving such a major national issue -- namely, what the public will view on the nation's most powerful medium of cummunication -- that contains such scanty findings of fact or such unsupported and inconsistent conclusions.

The FCC also argues (pp. 21-23) that it is perfectly proper for members of an agency to compose their differences and reach a concensus opinion. But more was involved here. By the Commission's own admission, it struck a compromise to satisfy the demands of competing private interest groups (¶ 82, JA 113-14). The stakes of the game were clearly illuminated by the Commission's Economist and by the parties themselves:

Continuation of PTAR was sought by two (and now three) of the networks to enhance their power (A 167-69); by game show entrepreneurs and other producers or importers of inexpensive access fare; by large network-affiliated stations which profited by licensing inexpensive game shows and increasing commercials (A 170); and by large unaffiliated stations who enjoyed the competitive advantage given them by a ban on "off-network" shows and feature films for affiliated stations (A 170). Continuation of the rule was opposed by the vast majority of independent producers, large and small, who wanted free access to an unrestricted market for their creative works. The FCC sought to strike an economic balance among these private interests. In the process, it ignored the public interest and sacrificed fundamental First Amendment rights.

CONCLUSION

Underlying all the answering briefs is the Commission's assertion that the Rule "had not had an adequate test period." (p. 14, 8-9, 18, 20).

It is true that an administrative agency rule which has not lived up to all of its expectations should be allowed enough time to determine whether further progress is possible. But a rule like PTAR which has in each year of its operation steadily worsened the very problems it was intended to overcome cannot be continued at the expense of the public interest, particularly because it involves a curb on Constitutional rights. How much time is enough time to continue experimenting with an administrative curb on First Amendment rights in the vain hope that it will ultimately expand those rights?

-- Three years of actual experience with the operation of the access rule was enough time for the Commission to decide that the rule had failed to achieve diversity and had to be changed without waiting.

-- Three years of actual experience was enough time to convince Westinghouse, the originator of PTAR, and other producers (including the founder of NAIPTD), that local stations would not purchase from them diversified syndicated shows for access time periods when the considerably less expensive game shows, stripped shows and foreign imports were available, and thus those

producers abandoned access production, convinced that the economics of the markerplace would not alter this conclusion regardless of how long the rule remained.

-- Three years of experience was enough time to convince all three networks and the FCC's own Economist that PTAR was not a curb on network dominance but an aid, and thus the networks became proponents of the rule, certain that the future would not bring about any fulfillment of the rule's original anti-network intentions.

In short PTAR has now had more than "some operational experience under competitive conditions" which the Commission, and this Court in Mt. Mansfield, deemed necessary for a determination as to its success in achieving its objectives. (442 F.2d at 483, note 42, emphasis added). Those goals have not been achieved, and three years have made clear to both the networks and producers that, by reason of economic necessities, they never will be.

We agree with the statement in ABC's brief (App. A, p. 5) that all provisions of the new rule must be viewed as an integrated entity and that individual elements "cannot be taken in isolation one from the other." We also agree with the FCC (Br., pp. 29-31) that all parties had ample notice of the new

changes. The petitioners, it should be noted, made substantial investments in reliance on the FCC's November 29, 1973 Notice of modifications in the rule.*

But we respectfully submit that PTAR, with or without the new changes, violates the public interest and the First Amendment, and we therefore request invalidation of the rule in its entirety.

Respectfully submitted,

Of Counsel

Theodore C. Sorensen
Stuart Robinowitz
George P. Felleman
Donald E. Brown

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

Of Counsel

Jerome S. Boros

FLY SHUEBRUK BLUME & GAGUINE
45 Rockefeller Plaza
New York, New York 10020

Attorneys for Petitioners
WARNER BROS., INC. AND
COLUMBIA PICTURES INDUSTRIES, INC.
AND Intervenors NATIONAL COMMITTEE
OF INDEPENDENT TELEVISION PRODUCERS
AND SAMUEL GOLDWYN PRODUCTIONS

Dated: New York, New York
April 9, 1974

---

* See Brief and Affidavit of Warner and Affidavit of Columbia, dated March 6 and 7, 1974, respectively, in opposition to stay motions of NAITPD, Westinghouse and Time-Life.

Affidavit of Service

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

VITOLD J. de STRONIE, being duly sworn, deposes and says:

1. That I am over the age of 18 years, reside in the State of New York and am not a party to the action.

2. That on the 9th day of April, 1974 I served two copies of:

Reply Brief of Petitioners Warner Bros., Inc. and Columbia Pictures Industries, Inc. and Intervenors National Committee of Independent Television Producers and Samuel Goldwyn Productions

upon the following attorneys at the addresses designated by them for that purpose:

RENOUF, McKENNA & POLIVY
Attorneys for Petitioner
NAITPD (Case No. 74-1168)
1532 Sixteenth Street, N.W.
Washington, D. C. 20036

JOSEPH MARINO, ESQ.
Associate General Counsel
Federal Communications Commission
Washington, D. C. 20054

THE HONORABLE WILLIAM B. SAXBE
Attorney General of the United States
United States Department of Justice
Washington, D. C. 20530

JOHN LANE, ESQ.
Attorney for Petitioner
Westinghouse Broadcasting Co., Inc.
(Case No. 74-1283)
Hedrick & Lane
1211 Connecticut Avenue, N.W.
Washington, D. C. 20036

WILNER, CUTLER & PICKERING
Attorneys for Intervenor CBS, Inc.
(Case No. 74-1168)
1666 K Street, N.W.
Washington, D. C. 20006

ARTHUR SCHEINER, ESQ.
Attorney for Intervenor MCA, Inc.
(Case Nos. 74-1168, 74-1283)
Wilner & Scheiner
2021 L Street, N.W.
Washington, D. C. 20036

McKENNA, WILKINSON & KITTNER
Attorneys for Intervenor ABC, Inc.
(Case Nos. 74-1168, 74-1283)
1150 17th Street, N.W.
Washington, D. C. 20036

HOWARD MONDERER, ESQ.
Attorney for Intervenor NBC, Inc.
(Case No. 74-1168)
1800 K Street, N.W.
Washington, D. C. 20006

PETER BIERSTEDT, ESQ.
Attorney for Intervenor
Time-Life Films, Inc.
(Case No. 74-1168)
Hardee Barovick Konecky & Braun
300 Park Avenue
New York, New York 10022

Said service was made by depositing a true copy of the document enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Vitold J. de Stronie

Sworn to before me this
9th day of April, 1974

Notary Public

CLARA A. LAURO
Notary Public, State of New York
No. 30-7443100
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1976